United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7209

To be argued by
BRUCE A. MCALLISTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

EMILE A. WILLIAMS,

Plaintiff-Appellant,

—against—

MCALLISTER BROTHERS INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLEE McALLISTER BROTHERS INC.

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE McALLISTER BROTHERS INC.

Statement of Facts

Appellant Emile A. Williams applied for employment by Port San Juan Towing Company on April 2, 1970. The contract of employment entered into thereafter is the contract between Port San Juan Towing Company and Associated Maritime Workers Local No. 8 of Puerto Rico. Port San Juan is a wholly-owned corporate subsidiary of Defendant McAlliste- Brothers Inc., a New York Corporation. Appellant Williams worked on a somewhat intermittent basis aboard various tugs operated by Port San Juan including the BARBARA McALLISTER. On December 6, 1970, Williams was injured in a fall aboard

the tug BARBARA McALLISTER. The tug BARBARA McALLISTER was bareboat chartered by McAllister Brothers to Port San Juan by demise charter on May 1, 1968.

In accordance with the agreement between Port San Juan and Plaintiff's Union, Port San Juan paid Williams a total of $1,620 in maintenance and cure. Fondo del Seguro del Estado, the Puerto Rican State Insurance Fund, paid Williams $810, for a total of $2,430.

Williams then commenced an action against McAllister Brothers Inc., who moved for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing the complaint on the ground that it was not the employer of the Plaintiff, that it had bareboat chartered the Tug to Plaintiff's employer prior to the accident, and that the Workmen's Accident Compensation Statute of Puerto Rico bars the suit. That motion was granted by Judge Charles E. Stewart, Jr. on February 24, 1975.

ARGUMENT

POINT I

Port San Juan Towing Company is not the "instrumentality" of McAllister Brothers Inc.

Appellant Emile A. Williams ("Williams") first bases its case for reversal on the contention that the record in the court below established that Port San Juan Towing Company ("Port San Juan") was the mere "instrumentality" of Appellee McAllister Brothers Inc. ("McAllister"). McAllister respectfully submits that the record below completely belies any such contention, and that no genuine issue concerning "instrumentality" has been presented.

Appellant has, to be sure, accurately perceived that "in order to establish that a subsidiary is the mere instrumentality of its parent, three (3) elements are to be proved": (1) *control* by the parent to such a degree that the subsidiary has become its mere instrumentality, (2) *fraud or wrong* by the parent through its subsidiary, and (3) *unjust loss or injury* to the claimant. (Appellant's Brief, pp. 11-12) However, in presuming that in the present case, "the *fraud or wrong** lies in the deliberate attempt of Defendant to circumvent applicable Jones Act liability", and that "the *unjust loss or injury* to Plaintiff is evident in the fact that he has been disabled . . . and has received only a mere $1,620.00 representing the maintenance and cure to which he was entitled under the General Maritime Law" (Appellant's Brief, p. 12), Appellant has sorely misconceived the proper circumstances under which the "instrumentality" rule is applied. Indeed, the very first case relied upon in Appellant's own Brief exposes this misconception.

In *Fanfan* v. *Berwind Corp.*, 362 F.Supp. 793 (E.D.Pa. 1973) (cited in Appellant's Brief, p. 6), a seaman sought to hold the parent corporation of his Puerto Rico employer liable under the "instrumentality" rule for an injury sustained by the plaintiff, arguing that the parent corporation ought to be liable for Jones Act negligence and the unseaworthiness of the Vessel. However, despite the claim in *Fanfan, supra, as to the injury sustained and the responsibility of the parent corporation for Jones Act liability,* the Court there held in no uncertain terms that the plaintiff "failed", under the "instrumentality" theory, "to produce *any evidence*" either that the parent had thereby perpetrated a fraud or wrong, or that an "unjust" loss or injury had thereby been suffered by the claimant. 362 F.Supp., at 796. The Court concluded as follows:

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* Emphasis added throughout this Brief.

> "Rule 56(d), Federal Rules of Civil Procedure, requires a party opposing a motion for summary judgment supported by affidavits to set forth specific facts showing that there is a genuine issue for trial. . . . *Fanfan has failed to establish any of the three elements necessary to a finding that Lighterage is a mere instrumentality of Berwind.*" 362 F. Supp., at 796.

In short, the elements of fraud and unjust loss have not been presented merely by the allegations that the Appellant sustained a personal injury and that the parent corporation of his employer is not subject to Jones Act liability.

Parenthetically, Appellee notes that even if the record demonstrated that Port San Juan was incorporated as a "deliberate attempt" by McAllister to avoid Jones Act liability (Appellant's Brief, p. 12)—a contention for which there is not a shred of evidence—it is well-established that a legitimate purpose for incorporation may be the avoidance of personal liability, and that such avoidance would not constitute evidence of fraud. Thus, for example, as observed in *United States* v. *White Sulphur Springs, Inc.*, 57 F.Supp. 48, 52 (S.D.W.Va. 1944), "Evasion of a just obligation is one thing; avoidance of the possibility of incurring an obligation is quite another thing". See also *Mull* v. *Colt Co., Inc.*, 178 F.Supp., 720, 721 (S.D.N.Y. 1959), *appeal dism'd sub. nom. Mull* v. *Ackerman*, 279 F.2d 25 (2d Cir. 1960). The Court in *Fanfan, supra,* was well aware of this principle when it granted summary judgment against the plaintiff.

While no further argument on the issue of "instrumentality" seems necessary, McAllister is also prompted by the weight of evidence in the record to point out that no genuine issue has been presented concerning McAllister's alleged domination and control over Port San Juan.

This Court has acknowledged the "presumption of separateness" given to related corporations, *American Renaissance Lines, Inc.* v. *Saxis Steamship Co.*, 502 F.2d 647, 677 (2d Cir. 1974), a practice which coincides with the persistent caution exercised by the courts before penetrating a corporate veil. *Quinn* v. *Butz*, 510 F.2d 743, 759 (D.C. Cir. 1975). Thus, the "instrumentality" rule is "rarely applied", and then only under "special circumstances", for "the rule runs contrary to the established principle of corporate limited liability". *American Trading and Production Corp.* v. *Fischbach & Moore Inc.*, 311 F. Supp. 412, 413 (N.D. Ill. 1970). Courts will start from the general rule that the corporate entity should be recognized and upheld, "unless specific, unusual circumstances call for an exception". *Zubik* v. *Zubik*, 384 F.2d 267, 273 (3d Cir. 1967), *cert. denied*, 390 U.S. 988. See also *In Re Penn Central Securities Litigation*, 335 F. Supp. 1026, 1035 (E.D. Pa. 1971) (". . . this power is only to be used in exceptional circumstances"); *Berger* v. *Columbia Broadcasting System, Inc.*, 453 F.2d 991, 994 (5th Cir. 1972), *cert. denied*, 409 U.S. 848 (1972) (". . . the dual personality of parent and subsidiary is not lightly disregarded, since application of the instrumentality rule operates to defeat one of the principal purposes for which the law has created the corporation"). The record below amply controverts any suggestion of the kind of domination and control requisite to invoking the "instrumentality" rule.

McAllister's motion for summary judgment was supported by affidavits both from the Assistant Secretary of McAllister ("Rogers Affidavit") (A-29)* and from the Vice-President and General Manager of Port San Juan ("Coleman Affidavits Nos. '1' and '2' ") (A-31 and A-38 respectively), by the Deposition of the former Vice-President and

* References to items in the Appendix are designated by the letter "A" followed by the appropriate page number.

Treasurer of McAllister ("Farrell Deposition") (A-60) and Supplementary Statement thereto (A-110), and by Memoranda of Law setting forth in detail the legal bases for McAllister's motion (Items Nos. 14 and 20 of the Index to the Record on Appeal).

In response to Appellant's allegation that Port San Juan was an "instrument" of McAllister, the Farrell deposition (A-60) firmly established that the corporate entities of Port San Juan and McAllister were and are kept strictly separate and distinct, and that there is not the slightest hint of any fraud or wrongdoing to justify invocation of the instrumentality rule. The two Coleman affidavits (A-31; A-38) likewise confirmed that the operational decisions of Port San Juan were and are made by its employees only within the framework of general policies and guidelines of McAllister, and that there was totally lacking the requisite degree of control over Port San Juan to justify the relatively drastic measure of "piercing" of a corporate veil.

In sum, Williams' effort to satisfy two of the three necessary elements of the "instrumentality" rule by equating absence of Jones Act liability with "fraud or wrong", or relegation of recovery for personal injuries to workmen's compensation benefits with "unjust" loss or injury are entirely misplaced. Appellant's further characterization of a "deliberate attempt" to circumvent Jones Act liability finds no support anywhere in the record, and is to no avail in Appellant's bootstrapping effort to establish fraud or wrong. Moreover, the record below did not raise a genuine issue as to domination or control by McAllister necessary to invoke the "instrumentality" rule.

POINT II

The District Court properly held that the Puerto Rico Workmen's Accident Compensation Statute is Plaintiff's sole remedy.

As Appellant Williams notes (Appellant's Brief, p. 15), Judge Stewart specifically held in the District Court that even if McAllister and Port San Juan were found to be one entity, plaintiff's suit would still be dismissed. The basis for that decision was that the Puerto Rico Workmen's Accident Compensation Statute, 11 L.P.R.A. §1 *et seq.*, would remain as Williams' exclusive remedy (A-127), i.e. that even if Port San Juan were the "instrumentality" of McAllister, then the latter would simply stand in the shoes of Port San Juan and, as such, be entitled to rely upon the very same defenses which its subsidiary would have been entitled to invoke, viz. the exclusiveness of the remedy afforded by the Puerto Rico statute. Thus, if the "instrumentality" rule was invoked, McAllister may have become exposed to a liability otherwise charged only to its subsidiary Port San Juan, but at the same time McAllister would have been entitled to invoke the very same defenses which Port San Juan could raise, viz. exclusive compensation under the Puerto Rico statute.

POINT III

The District Court applied the proper law.

Even assuming that Appellant Williams was entitled to proceed against McAllister under the Jones Act—a proposition specifically rejected by Appellee and discussed under Points I, II and IV of this Brief—the contention that the District Court "erred in applying the law of the wrong forum" (Appellant's Brief, p. 16) is totally misplaced.

Once again, the decision in *Fanfan, supra,* reveals Appellant's misconception of the applicable legal principles.

In *Fanfan, supra,* the plaintiff seaman sought to impose Jones Act liability upon the American parent company of his Puerto Rico employer by relying upon the action taken in *Hellenic Lines Ltd. v. Rhoditus,* 398 U.S. 306 (1970), where the Court "pierced" a vessel's Greek flag to discover, *inter alia,* that 95 per cent of the stock of the vessel's owning company was in fact owned by an American domiciliary. However, the Court in *Fanfan, supra,* at the very outset observed that the plaintiff's reliance on *Hellenic Lines Ltd., supra,* as well as *Lauritzen* v. *Larsen,* 345 U.S. 571 (1953) and other related cases to establish liability against the American corporation was "misplaced". 362 F.Supp., at 796. The Court went on to explain:

> "In the instant case, there is no choice of law problem similar to that in *Rhoditus* and *Lauritzen,* and no need for the Court to pierce the corporate veil of Lighterage [plaintiff's Puerto Rico employer], particularly since Congress authorized the legislature of Puerto Rico to enact legislation inconsistent with the Jones Act and general maritime law for application to the territorial waters of Puerto Rico. . . . The Legislature of Puerto Rico exercised the power granted to it by Congress in enacting the Workmen's Accident Compensation Act, which by its terms "shall be the only remedy against the employer" . . . *Even if the Rhoditus and Lauritzen holdings were to be applied in the instant case, they could only be utilized to attempt to hold Lighterage liable under the Jones Act,* based upon its ownership by the American parent, Berwind. *We, therefore, find no reason to apply the factors as announced in Lauritzen and applied in Rhoditus to determine the applicability of the Jones*

Act to this accident, which occurred within the territorial waters of Puerto Rico." 362 F.Supp., at 796-797. [Citations omitted].

In sum, the District Court applied the proper law in confirming that the Puerto Rico Workmen's Accident Compensation Statute is the exclusive remedy of Appellant Williams.

POINT IV

Appellant was properly precluded from proceeding against McAllister Brothers Inc. under the Jones Act and General Maritime Law.

Appellant's contention that the District Court erred in precluding an action against McAllister under the Jones Act and General Maritime Law is equally without merit.

Appellee McAllister of course agrees that under the Puerto Rico Workmen's Compensation Act, an injured workman or employee has the option to sue a third-party who, under the terms of the Act, may be "responsible for such injury". (11 L.P.R.A., at §32) (cited in Appellant's Brief, p. 26). However, since the record below uncontrovertably established that prior to the accident in question Port San Juan became the bareboat charterers of the Tug, and that Williams' injury was neither alleged to have been caused by, nor in fact caused by, any unseaworthiness existing prior to the demise charter and attributable to McAllister, Appellant would not be a third-party "responsible" for such injury.

The Supreme Court in *Reed* v. *Steamship Yaka*, 373 U.S. 410, 415 (1963) held that where a seaman's employer is "also a bareboat charterer and operator of a ship . . . [he is] . . . as such . . . charged with the traditional,

absolute, and nondelegable obligation of unseaworthiness which it should not be permitted to avoid". Similarly, in *Leary* v. *United States,* 81 U.S. 607 (1872), the Supreme Court held that under a bareboat charter, "the charterer becomes the owner of the vessel chartered for the voyage or service stipulated and, consequently, becomes subject to the duties and responsibilities of ownership". The demise charterer is thus "the 'employer' for purposes of personal injury liabilities to seamen under the Jones Act, since the crew is hired by him". Gilmore and Black, *The Law of Admiralty* (1975), at p. 242. See also *Bergan* v. *International Freighting Corp.*, 254 F.2d 231 (2d Cir. 1958); *Schnell* v. *United States,* 166 F.2d 479 (2d Cir. 1948), *cert. denied,* 334 U.S. 833 (1948); *Santiago* v. *United States,* 102 F. Supp. 425 (S.D.N.Y. 1952).

In the present case, the uncontroverted facts as set forth in the Farrell deposition (A-60) and Supplementary Statement thereto (A-110), the Rogers affidavit (A-29), and the Answers to Interrogatories (A-10; especially Answer to Interrogatory No. 35, at A-17), all coupled with the bareboat charter agreement (A-35), Damage Report (A-37), and Decision of the Administrator of the State Insurance Fund (A-54), constituted more than sufficient basis for the court below to find not only that Port San Juan was the owner *pro hac vice* of the Tug at the time of the accident, but that the accident could not have been, *as in fact it was not alleged to have been,* caused by any condition existing at the time the Tug was bareboat chartered, i.e. over two and one-half years prior to the accident.

Indeed, by order dated February 24, 1975 (A-127), Judge Stewart specifically found that on the basis of the affidavits, depositions, and other documents on file with the Court (along with memoranda of law submitted by counsel for Appellant and Appellee), the Puerto Rico statute was

"applicable" so as to make Wiliams' compensation against Port San Juan his exclusive remedy; in so finding, the Court was at once necessarily holding that the injury upon which the claim was based was *not,* in the words of the Statute, *"caused under circumstances making a third-party* [i.e., McAllister] *responsible for such injury"*. 11 L.P.R.A. §32.

Consequently, the District Court did not err in precluding Williams from proceeding against McAllister under the Jones Act or the General Maritime Law.

POINT V

Summary Judgment was properly granted.

McAllister's motion for summary judgment (A-24) was made pursuant to Rule 56, F.R. Civ. Proc., which provides in material part as follows:

> "(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

The purpose of a Rule 56 motion is "to permit the trier of facts to pierce formal allegations of facts in pleadings and [to] grant relief by summary judgment when it appears from uncontroverted facts set forth in affidavits, depositions or admissions on file that there are as a matter of fact no genuine issues for trial". *Christianson* v. *Gaines,* 174 F.2d 534, 536 (D.C. Cir. 1949).

In accordance with Rule 56, McAllister's motion was supported by numerous affidavits from officers of McAllister

and Port San Juan (A-29; A-31; A-38), by the deposition of the former Vice-President and Treasurer of McAllister ("Farrell Deposition") (A-60) and Supplementary Statement thereto (A-110), and by Memoranda of Law setting forth in detail the legal bases for McAllister's motion (Memorandum—and Reply Memorandum—of Law in Support of Motion for Summary Judgment, Items Nos. 14 and 20 of the Index to the Record on Appeal).

Under Rule 56, a party responding to a motion for summary judgment supported by affidavits and depositions *must* set forth specific facts which raise a genuine issue for trial. Subsection (e) of Rule 56 expressly provides as follows:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

As held by this Court in *Fitzgerald* v. *Westland Marine Corporation*, 369 F.2d 499, 500 (2d Cir. 1966), mere formal allegations by an appellant will not forestall the award of summary judgment:

> "In this case, appellant's affidavit in opposition to the motion to dismiss asserted that 'the essence of the complaint against Westland was that it owned, operated and controlled the vessel in question at the time of the disaster'. But this Court has stated, 'mere formal * * * allegations, while sufficient to stand as pleadings * * * [are] to be pierced upon Rule 56

> motions and * * * [may] not forestall the award of summary relief'." (Citations omitted).

Indeed, in *Fitzgerald, supra,* a defendant shipowner who had been sued in a personal injury action was granted its motion for summary judgment once the Court recognized that appellant had "no real support for its version of the facts", whereas "the totality of all the facts" supported the appellee's position. 369 F.2d, at 500.

Similarly, in *Garcia* v. *American Marine Corporation,* 432 F.2d 6 (5th Cir. 1970), a shipyard worker who had brought a personal injury action based on alleged negligence and unseaworthiness unsuccessfully appealed from an order of the district court which had granted summary judgment in favor of the defendant; the Court of Appeals stated at pp. 7-8:

> "To controvert a proper motion for summary judgment, a party may not rest upon allegations and denials in his pleadings; he must set forth specific facts showing a genuine issue for trial. Garcia did not do so and therefore may not complain on appeal of the trial court's action."

See also *Noto* v. *Cia Secula di Armanento,* 310 F.Supp. 639, 643 (footnote 7) (S.D.N.Y. 1970) (summary judgment granted where plaintiff failed to contradict sworn averments proposed by defendant).

As Appellant himself conceded (Appellant's Brief, pp. 11-12), in order to establish that a subsidiary is the mere instrumentality of its parent, the elements of control, fraud, and unjust loss or injury must be shown. Moreover, in order to support a third-party claim against McAllister, Williams implicitly concedes (Appellant's Brief, pp. 29-30) that there would have to be shown the absence of a demise

charter to Port San Juan, or the presence of an unseaworthy condition existing prior to the charter and causing the injury in question.

McAllister respectfully submits that Appellant failed, on the basis of the Affidavit of Williams (A-78) and the Affidavit of Williams' attorneys (A-82), to controvert the evidence submitted by McAllister in opposition to Appellant's allegations, and the District Court thus did not err in granting summary judgment.

CONCLUSION

The decision of the District Court granting Appellee McAllister's motion for summary judgment should be affirmed.

October 7, 1975

Respectfully submitted,

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Brief is admitted this
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